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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Sections of the)
Cable Television Consumer)
Protection and Competition)
Act of 1992: Rate Regulation)

MM Docket Nos. 92-266, 93-215.

**REPLY TO OPPOSITIONS TO AND COMMENTS ON
PETITIONS FOR RECONSIDERATION**

Public Interest Petitioners, pursuant to Section 1.429(g) of the Commission's rules, hereby reply to the Oppositions to Petitions for Reconsideration and Comments filed on June 16, 1994 in the captioned proceeding. 1/ Public Interest Petitioners include Dr. Everett C. Parker, Henry Geller and Black Citizens for a Fair Media. 2/

With each passing day, more basic and enhanced basic cable programming services are placed at risk by the FCC's current rate regulations. "Basic cable is dead," one cable programming executive told his staff, according to a front page NEW YORK TIMES article. 3/ As Public Interest Petitioners demonstrated in the Petition for Expedited Reconsideration, many new

1/ Liberty Media Corporation urges the Commission to address the "going forward" rules in the context of the Fifth Notice of Proposed Rulemaking in the captioned proceeding, rather than in the context of reconsideration, as requested by Public Interest Petitioners and several other petitioners for reconsideration. *See* Comments of Liberty Media Corporation filed June 16, 1994. Public Interest Petitioners strongly disagree. Delay only increases the risk to new networks and further entrenches established services. However, if the Commission decides to consider the "going forward" issues in the context of the Fifth Notice, Public Interest Petitioners hereby request that the Commission consider the Petition for Reconsideration and the instant filing made by Public Interest Petitioners as part of that record and expedite the proceeding by moving up the reply date to in mid-July at the latest.

2/ *See* Letter to FCC Secretary, May 18, 1994.

3/ Carter, *Cable TV Industry Shifts Approach as Growth Slows*, NEW YORK TIMES, May 23, 1994 at A1.

programming services have been delayed and are at risk of being extinguished as the current rules freeze, and in some cases, reduce available channel capacity. Most vulnerable are those niche services that would fulfill the promise of an information-rich cable medium. For example, C-Span and C-Span 2 have been cut back on cable systems serving more than four million households, and in some cases, dropped altogether. ^{4/} Fine arts channels, such as PBS Horizons Network, have had to delay their launch plans, and other quality services, such as Ovation and The History Channel, are finding it difficult to build a subscriber base. ^{5/} As Petitioners have already demonstrated, these problems are devastating to services for special populations, such as the disabled. ^{6/}

None of this was intended by Congress when it passed the 1992 Cable Act. Just the opposite was intended. Congress sought to promote programming diversity and enhance consumer choice. But - as everyone agrees - programming diversity is now threatened by the Commission's rules. The industry unanimously supports the need to increase incentives for cable operators to add programming. ^{7/} All segments of the industry - new programming channels preparing to launch (such as Ovation and PBS Horizons), established programmers (A&E and ESPN), vertically integrated programmers (Times Mirror) and cable operators (Continental Cablevision, Inc.) - urge the FCC to revise the rules to provide meaningful incentives for cable systems to add programming and to increase channel capacity.

^{4/} Kolbert, *Some Cable Systems Are Cutting C-Span for Other Channels*, NEW YORK TIMES, June 20, 1994, at A1. Zoglin, *Cable's Big Squeeze*, TIME, June 27, 1994, at 68.

^{5/} *Id.*

^{6/} See Declaration of Sheldon I. Altfield, attached to Petition for Expedited Reconsideration of the Public Interest Petitioners.

^{7/} See, e.g., Comments filed May 16, 1994 by Ovation, Inc., and PBS Horizons Cable Network at 8-13, Petition for Reconsideration filed May 16, 1994 by Eternal Word Network at 8, Comments filed June 16, 1994 by The Arts and Entertainment Network and ESPN, Inc., Opposition to Petitions for Reconsideration filed June 16, 1994 by Liberty Media at 4.

I. INCENTIVES TO ADD PROGRAMMING MUST BE STRENGTHENED

The lack of sufficient channel capacity to add new services is aggravated by the FCC's rate regulations, which encourage operators to favor unregulated services over regulated ones. As noted by the President of Time Warner Cable of New York, based on the new rules, "cable operators are only motivated to launch services that are unregulated. And those may not be the best services for our customers." ^{8/} The new rules also leave many questions unanswered about the extent to which upgrade costs may be recovered from subscribers, ^{9/} adding to operators' reluctance to add channels. The FCC must revisit its rules governing programming incentives to insure that expansion of service offerings continues to be worthwhile for operators and subscribers alike.

It is significant that the industry has uniformly rejected the 7.5 percent mark-up on programming as insufficient to encourage operators to add channels. The 7.5 percent mark-up -- or any mark-up based on the cost of the programming -- discriminates against free or low cost programming in favor of more expensive programming. However, even established networks object to the 7.5 percent mark-up as inadequate. ^{10/} For example, noting that the percentage-based mark-up discriminates in favor of high-priced channels, A&E and ESPN's Comments propose either a flat fee mark-up (such as 30 cents per subscriber per month) or a graduated flat fee (30 cents for a new channel with 20 million subscribers; 25 cents for a service with 20 million to 30 million subscribers; 20 cents for service with more than 30 million subscribers).

^{8/} Richard Zoglin, *Cable's Big Squeeze*, TIME, June 27, 1994, at 66.

^{9/} *Report and Order and Further Notice of Proposed Rulemaking, Rate Regulation*, FCC 94-39 ¶¶ 287-88 (released March 30, 1994), (streamlined cost-of-service procedures will be available only for "significant" upgrades that "actually will benefit subscribers," and no "frivolous" or "inefficiently incurred" costs may be included).

^{10/} See Comments of A&E and ESPN in Support of Petitions for Reconsideration, filed June 16, 1994.

11/ The proposal to graduate the mark-up based on penetration correctly recognizes that services with low penetration rely more heavily on subscriber fees than advertising for revenues. Similarly, Continental Cablevision, Inc.'s proposal -- to permit operators to increase rates for a channel addition based on the cost of the programming plus an average margin -- also would provide a level playing field for all programming services competing for limited channel space. 12/

Any of the incentive proposals advocated in these comments would represent an improvement over the FCC's current rules. No one disputes this. Accordingly, we urge the Commission to act quickly to fix regulations that all agree are broken.

II. DISINCENTIVES TO THE ADDITION OF NEW CHANNELS MUST BE ELIMINATED

While all apparently agree that new programming needs more of an incentive if it is to flourish, certain local regulators have questioned some of the proposals to remove regulatory barriers to channel expansion. 13/ Specifically, the National Association of Telecommunications Officers and Administrators and the City of New York (collectively "NATOA") have opposed suggestions that would facilitate the addition of new programming channels to cable systems. As demonstrated below, there is no foundation for such opposition. But on a more fundamental level, the Commission must affirm that the interests of subscribers transcend the prerogatives of local regulators.

NATOA first attacks the suggestion that the FCC, not local authorities, should make initial à la carte decisions. In defense of its position, NATOA argues that franchise authorities must be permitted to determine which channels should be included in calculating

11/ *Id.* at 9.

12/ *See* Response of Continental Cablevision, Inc. to Petitions for Reconsideration filed June 16, 1994.

13/ NATOA Opposition at 3-8.

permissible rates for regulated service. NATOA also notes that operators may appeal local à la carte decisions to the FCC, an important feature of the rules to insure that cable operators may "fully protect their rights." ^{14/} Nowhere does NATOA explain why it would be more efficient for franchise authorities to make initial à la carte determinations when lengthy appeals to the FCC for an ultimate decision eventually will occur in most cases. Efficiency and consistency dictate that the FCC should retain jurisdiction over initial à la carte decisions.

Second, NATOA objects to the treatment of certain upgrade costs as external costs to be passed through automatically. The basis for NATOA's objection is a fear that operators will abuse the process by recklessly passing through astronomical upgrade costs. ^{15/} However, this objection is illusory because franchise authorities may examine any increases in basic rates and any increases in cable programming services rates are subject to complaint at the FCC. Thus, the automatic pass-through of upgrade costs would permit operators to quickly recover legitimate costs of improving their plant, while any bad actors which pass through excessive costs would be required to issue refunds.

Third, NATOA argues that increases in external costs should not be passed through automatically 30 days after notification to the franchise authority. ^{16/} Citing the inability of franchise authorities to complete a rate analysis within a 30-day time period, NATOA insists that local authorities must be permitted to delay the effectiveness of rate increases while they evaluate them. This does not make sense. A scheme that would permit rate increases to take effect subject to refund if rates are ultimately found to be unreasonable, would protect consumers while not penalizing cable operators.

^{14/} NATOA Opposition at 3.

^{15/} NATOA Opposition at 4.

^{16/} NATOA Opposition at 6-7.

Finally, without justification or explanation, NATOA believes that a rate complaint should open up the entire rate structure to scrutiny, not just the amount of the increase. ^{17/} NATOA barely addresses the statutory impediments to this position, avoiding the express statutory language prohibiting review of September 1, 1993 rates after February 28, 1994. Nor does NATOA acknowledge the practical problems that this rule creates -- cable operators will avoid rate increases (and therefore will avoid channel additions, upgrades and other improvements) for as long as possible to avoid review of their entire rate structures.

In short, NATOA again has taken positions -- without any evidence to support them -- based entirely on the assumption that cable operators will game the system in every possible way. It is unfair to punish an entire industry based on the speculation that some operators will act unreasonably. Moreover, the threat of refund liability will weigh heavily against operators trying to pass through excessive amounts to subscribers.

III. CONCLUSION

The FCC must adjust the mark-up on programming to provide a meaningful incentive for operators to add new services. Other impediments that discourage operators from adding services also must be eliminated to provide a hospitable environment for the development and launch of new programming. The unsupported positions endorsed by NATOA should be rejected both because they would penalize all operators (and programmers) based on the assumption that all operators will attempt to charge customers unfairly and because there are procedural safeguards in place to prevent excessive charges by operators.

Ultimately, it is the subscribers who will suffer if regulation is not sufficiently flexible to allow new services to come into being. The market will eventually determine if there is sufficient consumer interest in a given programming concept, but it will do so only if consumers get the opportunity to see the programming. The Cable Act was adopted to enhance

^{17/} NATOA Opposition at 7-8.

consumer choice and to ensure that subscribers would be better served by cable television. But the fact is, many subscribers and potential subscribers are not being served. The Commission should act expeditiously to enable cable television to serve a wider audience with diverse programming.

Respectfully submitted,

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Dated: June 27, 1994

CERTIFICATE OF SERVICE

I, Henry Geller, hereby declare under penalty of perjury that on this 27th day of June, 1994, I forwarded by first-class mail, postage pre-paid, a copy of the foregoing Reply to the following:

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